

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

PATRICK GOMEZ,
Appellant.

No. 2 CA-CR 2019-0017
Filed November 19, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Greenlee County
No. CR201800050

The Honorable Monica L. Stauffer, Judge

VACATED IN PART AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Alexander M. Taber, Assistant Attorney General, Tucson
Counsel for Appellee

The Stavris Law Firm PLLC, Scottsdale
By Christopher Stavris
Counsel for Appellant

STATE v. GOMEZ
Decision of the Court

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 A jury found Patrick Gomez guilty of failing to appear at an arraignment, a class-five felony. A.R.S. § 13-2507. Finding Gomez to be a category-three repeat offender because of a prior felony conviction within the preceding ten years, and finding that he had committed a new felony offense while awaiting disposition on a previous felony offense, the trial court sentenced him to an aggravated prison term of six years. The court also ordered Gomez to pay \$55 in assessments and fees and entered a criminal restitution order (CRO) for that amount.¹ Gomez appealed, arguing the trial court had imposed an illegal sentence.² We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

¶2 At sentencing, the trial court asked, “Is Mr. Gomez eligible for early release credits and community supervision under the category three?” After defense counsel responded that he did not know the answer to the question, the court indicated its understanding that, under A.R.S. § 13-703, Gomez “loses [the] right” to earned release credits that would otherwise be available under A.R.S. § 41-1604.07. Gomez contends this conclusion, and the resulting flat-time sentence, was an error of law, urging us to vacate and remand for resentencing. Although the state disagrees with Gomez that a flat-time sentence was unavailable in this case, it nonetheless agrees that we should remand for resentencing because the court was under the misimpression that it had no discretion.

¶3 The state is correct that the trial court in this case had discretion to either impose a flat-time sentence or refrain from doing so, leaving Gomez eligible for early release based on earned release credits. *See* § 13-703(O) (court may specify that defendant must serve full “sentence

¹This included “a \$13.00 law enforcement equipment assessment; a \$20.00 surcharge; a \$2.00 victim fee; and a \$20.00 time payment fee.”

²Gomez does not challenge his underlying conviction, which we affirm.

STATE v. GOMEZ
Decision of the Court

imposed by the court” or leave defendant “eligible for release pursuant to § 41-1604.07”); § 41-1604.07 (establishing system of earned release credits “except for those prisoners who are sentenced to serve the full term of imprisonment imposed by the court”). Our legislature has eliminated that discretion when courts sentence defendants who have been convicted of certain types of crimes, *e.g.*, A.R.S. §§ 13-705 (dangerous crimes against children), 13-706 (serious, violent, or aggravated offenders), but a violation of § 13-2507, “failure to appear in the first degree,” is not one of those crimes. Because the judge in this case “wrongly felt [her]self confined by a non-existent presumption,” *State v. Garza*, 192 Ariz. 171, ¶ 14 (1998), we must remand for resentencing, *id.* ¶ 17 (“Even when the sentence imposed is within the trial judge’s authority, if the record is unclear whether the judge knew he had discretion to act otherwise, the case should be remanded for resentencing.”).

¶4 Gomez also contends the trial court erred in imposing a CRO before Gomez’s discharge from prison. He urges us to vacate the order and leave the issue to be addressed upon his release. The state agrees that it was improper for the court to issue a CRO at sentencing and requests that it be vacated. Because “a court may not lawfully impose a CRO at sentencing with respect to fees and assessments,” *State v. Cota*, 234 Ariz. 180, ¶ 16 (App. 2014), we agree with the parties that the CRO issued in this case must be vacated, *see State v. Lopez*, 231 Ariz. 561, ¶¶ 2, 6 (App. 2013) (vacating CRO because imposition of CRO before defendant’s sentence or probation has expired is illegal sentence).

Disposition

¶5 For the foregoing reasons, we affirm Gomez’s conviction, but vacate the sentence and CRO and remand for resentencing.